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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

Page

OPINION BELOW 1, 9a

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3, 1a

STATEMENT 4

REASONS FOR GRANTING WRIT 9

IMPORTANCE OF FEDERAL QUESTION 9

THE ULTIMATE ISSUE IN THE CASE HAS NEVER BEEN DECIDED BY THIS COURT AND THE DECISIONS OF THE COURT OF CLAIMS ARE INCONSISTENT AND CONFLICTING WITH A SHARP DIVISION AMONG THE MEMBERS OF THAT COURT 14

THE DECISION OF THE COURT OF CLAIMS UPON THE QUESTIONS OF CONTINUING OBLIGATION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.. 20

APPENDIX A—Statutes 1a

APPENDIX B—Mistakes and Injustices Resulting in Denial of Disability Retirement Pay as Disclosed in 1948 Congressional Hearings 4a

APPENDIX C—Opinion Below 9a

CITATIONS

CASES

Capps v. U. S., 137 F. Supp. 721, C. Cls. 1/31/56.....16, 17

Carlin v. U. S., 121 C. Cls. 643, 100 F. Supp. 451, 1951 8, fn. 8

Cuiffo v. U. S., 131 C. Cls. 60, 3/1/55 17

Duff v. U. S., 135 F. Supp. 527, C. Cls. 11/17/55 15, fn. 16, 17

Ellsworth v. U. S., 14 C. Cls. 382, 101 U. S. 170 .....18, 20

Field v. U. S., C. Cls. No. 525-53, 1956 18

Page

Girault v. U. S., 135 F. Supp. 521, C. Cls. 11/8/55 10, fn. 12, 15, fn. 16, 17, 18, 19, 20
Gordon v. U. S., 140 F. Supp. 263, C. Cls. 4/13/56 10, fn. 12, 19
Gusick v. Shilder, 340 U. S. 128, 131, 132 21
MacFarlane v. U. S., 140 F. Supp. 420, C. Cls. 4/3/56 16, 17, 18
Moore v. U. S., 76 C. Cls. 753 18
Odell v. U. S., 135 F. Supp. 539, C. Cls. 11/8/55 15, fn. 16, 17, 18, 20, 21
Palluconi v. U. S., C. Cls. No. 420-54, 6/6/56 17
Randolph v. U. S., 69 F. Supp. 156, D.C. D.C. 1946 ... 17
Robertson v. Chambers, 341 U. S. 27, 1956 .....8, fn. 8
Rosnick v. U. S., 132 C. Cls. 1, 132 F. Supp. 478, 4/5/55 and 7/12/55 17
Seabrook v. U. S., 140 F. Supp. 787, C. Cls. 5/1/56...16, 18
Soukaras v. U. S., 140 F. Supp. 797, C. Cls. 5/1/56 ... 17
Spencer v. U. S., 121 C. Cls. 558, 100 F. Supp. 444, 1951 8, fn. 8
Thompson v. U. S., 139 F. Supp. 935, C. Cls. 4/3/56 .. 15
Updike v. U. S., 132 C. Cls. 627, 132 F. Supp. 957, 1955 12, fn. 15
Uhley v. U. S., 128 C. Cls. 608, 121 F. Supp. 674, 6/8/54 16
U. S. v. Moser, 58 C. Cls. 164, 266 U. S. 236 21
U. S. v. Sing Tuck, 194 U. S. 161 21
Vaughn v. U. S., C. Cls. No. 355-54, 7/12/56 8, fn. 8, 12, fn. 15
Watson v. U. S., 21 C. Cls. 511, 130 U. S. 80 .....18, 21

STATUTES

R.S. 1246-50, 10 U.S.C. 961-965 .....6, fn. 6
R.S. 1253, 10 U.S.C. 966 .....6, fn. 6, 6a
R.S. 1268, 10 U.S.C. 861 .....4, fn. 1, 3a
R.S. 1274, 10 U.S.C. 865, 971 .....4, fn. 1
Act of April 3, 1939, 53 Stat. 557, 10 U.S.C. Sec. 456 3, 4, 1a
Act of September 26, 1941, 55 Stat. 734, 38 U.S.C. Sec. 12 .....3, 4, 6, fn. 6, 1a
Act of June 22, 1944, 58 Stat. 204, 38 U.S.C. Sec. 693i 3, 8, fn. 8, 12, fn. 15, 2a
Act of October 1, 1949, Career Compensation Act, 63 Stat. 802, 37 U.S.C. Sec. 272 .....12, fn. 15

Page

Act of October 25, 1951, 65 Stat. 655, 5 U.S.C. Sec. 191a
4, 8, fn. 9, 12, fn. 15, 3a
62 Stat. 976, 28 U.S.C. 2501 .....3, 1a

REGULATIONS

War Dept. Technical Manual 12-245, Oct. 1945, Par. 20-d, p. 49 .....6, fn. 5, 6a
A.R. 140-120, 20 Feb. 1950 .....7, fn. 7
A.R. 605-250, 28 March 1944 .....6, fn. 6

MISCELLANEOUS

Report of Investigation of Physical Disability Retirement of Officers of the Army, Navy and Marine Corps, Legal Subcommittee, Committee on Armed Services, House of Representatives, 1948
9, 10, 11, fn. 14, 7a
Hearings on H.R. 1181, 82nd Congress, by Committee on Armed Services, House of Representatives
9, fn. 10, 10, fn. 12, 11, fn. 13 & 14, 13, 4a-8a
House Report No. 449, Committee on Armed Services, 82nd Congress, May 10, 1951 14
15 Op. Attorney General 442 .....4, fn. 1
Veterans Administration Schedule for Rating Disabilities, 1945 .....6, fn. 5
Disabled American Veterans' "Semi-Monthly", Sept. 9, 1952, Sept. 29, 1953, May 31, 1954, Sept. 27, 1955 13

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WILLIAM R. BARKER,
201 Wood Street, Lexington, Massachusetts,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case, numbered 104-55 on the records of said court.

OPINION BELOW

The printed opinion of the United States Court of Claims appears in Appendix C hereto, *infra,* page 9a and it is reported in 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956 (R. 11-15). Petitioner's motion for reconsideration, rehearing and reference to Commissioner to hear evidence was denied on July 12, 1956 (R. 27). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1255(1).

QUESTIONS PRESENTED

Congress, in 1939, enacted legislation providing for disability retirement pay to officers of the Army of the United States other than those of the Regular Army. Thereafter, Congress established three separate administrative remedies to enable such officers to realize their retirement benefits: (1) A hearing before an Army Retiring Board (1941). (2) A review and a *de novo* hearing by an Army Review Board (1944). (3) A review and a *de novo* hearing by an Army Board for the Correction of Military Records (1951). In each case the findings of the Board were subject to the approval of the Secretary of the Army.

Under the Federal statutes, disability retirement pay is payable monthly.

1. If the six-year statute of limitations governing actions in the United States Court of Claims is applicable, does not the cause of action for retirement pay accrue each month so that only the portion of the pay which became due prior to the six-year statute is barred?

2. Where administrative review of administrative decisions is provided for by statute, and both the review and the original hearing are *quasi*-judicial proceedings, is it not necessary to exhaust the review prior to resorting to the Federal court and is not the statute of limitations tolled pending such review?

3. Where Congress provides a new administrative remedy for claimants who have not been able to obtain relief under existing administrative remedies, does not a cause

of action accrue upon the arbitrary denial of the new remedy?

4. In 1947, shortly after his separation from active duty, an Army Retiring Board finds that an officer is not permanently disabled for military service. In 1950, it ascertains that its previous finding was in error and that the officer had been permanently disabled. Because of this disability, the Army dismisses the officer from the Reserve, thereby finally terminating his military career. Does not his cause of action for retirement pay accrue at the time the Army discovered its mistake and dismissed him from the Reserve for physical disability, but refused to award him retirement pay for that disability or even to grant him a hearing to determine his eligibility therefor?

5. When the Army Retiring Board in 1947 promised the officer he could have a review of his retirement proceedings in five years and the officer seasonably applied for such a review, does not the arbitrary denial of a review give rise to a cause of action?

STATUTES INVOLVED

The statutes involved are:

1. The statute of limitations governing actions in the United States Court of Claims, 62 Stat. 976, 28 U. S. C., Sec. 2501 (Appendix A, page 1a).

2. The Act of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456, granting non-Regular officers of the Army of the United States disability retirement pay (Appendix A, page 1a).

3. The Act of September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12, in effect, providing for hearings by Army Retiring Boards (Appendix A, page 1a).

4. The Act of June 22, 1944, 58 Stat. 287, 38 U. S. C., Sec. 693i, providing for hearings by Army Review Boards (Appendix A, page 2a).

5. The Act of October 25, 1951, 65 Stat. 655, 5 U. S. C., Sec. 191a, providing for effective hearings by a Board for the Correction of Military Records (Appendix A, page 3a).

6. R. S. 1268, 10 U. S. C. 861, providing for monthly payment of Army pay (Appendix A, page 3a).

STATEMENT

Plaintiff filed a petition in the United States Court of Claims on March 14, 1955 requesting monthly [1] retirement pay by reason of disability incurred in the performance of combat duty as a Reserve Officer in the Army of the United States. (R. 1-4) The jurisdiction of the court was invoked under the Acts of Congress of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456 and September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12, providing for such retirement pay. (Statutes quoted in Appendix A, page 1a.)

On July 20, 1955, the Government filed a motion for summary judgment (R. 5) asserting that upon the facts alleged in the petition and contained in certain exhibits filed by the Government (R. 5a-5w), the claim was barred by the six-year statute of limitations governing actions in the United States Court of Claims (62 Stat. 976, 28 U. S. C. 2501).[2]

In opposition to this motion the plaintiff filed an affidavit with various exhibits attached (R. 7).[3]

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[1] A fact of great importance in this case, in which the issue is the statute of limitations, is that retirement pay is payable monthly and that, therefore, a new cause of action arises each month. The statutes providing for monthly payment are RS 1268, 10 U. S. C. Sec. 861 (quoted Appen. A., p. 3a) and R.S. 1274, 10 U. S. C. Sec. 865, 971. See 15 Op. Atty. Gen. 442.

[2] The motion was based upon additional grounds which are not pertinent here as they were not ruled upon by the Court of Claims, the court rendering judgment for the Government solely upon the statute of limitations.

[3] Plaintiff also filed a cross-motion for summary judgment contending that the exhibits filed by the Government and the plaintiff demonstrated that there was no genuine issue of fact upon the merits and that plaintiff was entitled to retirement pay.

On May 1, 1956, the court granted the Government's motion for summary judgment and dismissed plaintiff's petition, holding that the statute of limitations barred the plaintiff's cause of action (R. 15).

For the purpose of ruling upon the Government's motion for summary judgment, the facts alleged in plaintiff's petition and affidavit opposing said motion are conceded. Such facts are as follows:

Plaintiff planned to make military service his career. He entered Valley Forge Military College from which he graduated in 1942 at the age of 19 (R. 1, 7a). He was immediately commissioned a Second Lieutenant and put in command of an infantry unit and, after a period of training, was sent to the European Theatre of War where in 1943-4, he participated in the battles and campaigns of Anzio, Naples-Foggia and Rome-Arno (R. 7a, 7b), was promoted to Captain (R. 7a) and was awarded the Distinguished Service Cross and other high decorations (R. 2, 5b).

He was wounded in combat with the enemy and hospitalized on four separate occasions. In November 1943, an exploding shell perforated his left ear drum, causing a loss of hearing therein. He was hospitalized for two weeks (R. 2, 7b, 5j, 5s). In January 1944, a land mine exploded in his face, causing head wounds and injury to his left eyeball. Fragments were imbedded in his skin. He was hospitalized for one month (R. 2, 7b, 5j, 5s). In May 1944, he was struck with rifle fire below the knee and hospitalized five days. In June 1944, he was hit by artillery fire. His left arm was severely fractured and he was hospitalized for two years with complex skin and bone graft operations and considerable surgery on his left thigh and right lower leg (R. 2, 7b, 5j, 5s).

On July 25, 1946, after this long period of hospitalization, he was separated [4] from the active service and transferred to the Reserves to be available for call in Emergencies.

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[4] The word "separated" as used herein means that plaintiff was released from active duty and placed in a status of inactive duty.

Soon after his separation, he was examined by the Veterans Administration which found that his combat injuries had reduced his earning capacity in civilian occupation to the extent of 50 percent (R. 2, 7c).[5]

Because of these findings, he requested and was given a hearing by an Army Retiring Board (R. 7c).[6]

On March 27, 1947, the Board found that plaintiff was not permanently incapacitated for active service and the Secretary approved the finding. The Board informed plaintiff that his claim could be reviewed at any time within five years (R. 7d).

Because the Board found that plaintiff was not permanently incapacitated, he believed that his disability would improve, at which time he could resume his military career (R. 7d). The disability did not improve, however, and the Veterans Administration continued to rate it at 50 percent disabling (R. 7g).

In September 1950, as a result of the National Emergency arising from the Korean incident, plaintiff was recalled to active duty. In October, a physical examination

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[5] The Veterans Administration's criterion for disability compensation was the "reduction in earning capacity" or "the average impairment of earning capacity in civil occupations". (Veterans Administration, Schedule for Rating Disabilities, 1945, p. iii). The criterion for disability retirement pay in the Army of the United States was permanent incapacity for active or general military service, which was defined in the Army regulations as:

> ". . . permanently physically or mentally incapable of performing full military duty, field as well as garrison, in both peace and war." (W. D. Technical Manual 12-245, 1 October 1945, entitled "Physical Reclassification-Retirement and Retirement Benefits for Officers").

[6] In 1941, Congress implemented the basic Act of April 3, 1939, by granting non-Regular officers the right to a hearing by an Army Retiring Board (Act of Sept. 26, 1941, 55 Stat. 734, 38 U. S. C. Sec. 12; RS 1246-1250, 1253, 10 U. S. C. Sec. 961-966; AR 605-250, March 28, 1944; Act of Sept. 26, 1941 is quoted in App. A, p. 1a)

by the Army disclosed that he was, by reason of the identical disabilities which he had at separation and which time had proven to be static, and permanent, unfit for military service (R. 3, 7d). The Army emphasizing its need for Infantry officers, plaintiff attempted to return to active duty. In February 1951 he was again found physically disqualified by reason of his combat injuries (R. 7e, 5j-l). Moreover, the disabilities were found to be of such permanent nature as to disqualify the plaintiff from remaining in the Reserve to which he had been transferred at the time of his separation (R. 7e). This meant a complete termination of plaintiff's military career and he urgently requested a review of his physical condition with permission to remain in the Reserve. After such review, the Army again informed him it had no alternative but to dismiss him from the Reserve (R. 7e), which it proceeded to do in April 1951.[7] A complete orthopedic consultation in Walter Reed General Hospital following plaintiff's additional request for reinstatement again confirmed his physical disqualification by reason of the disabilities he had at separation (R. 7f).

Plaintiff's disabilities having now been found by the Army to have been permanently disqualifying and the Army having terminated his military career by reason thereof, he requested the review of his retirement rights to which the Retiring Board had assured him he was entitled.

In June 1951, the Secretary of the Army rejected plaintiff's application for a reconsideration by the Retiring Board. In March 1952, he rejected an application for a review by the Army Disability Review Board. Both rejec-

[7] Plaintiff was eligible for the Honorary Reserve and was transferred thereto, pursuant to AR 140-120, 20 Feb. 1950, which provided that individuals found to be "permanently physically disqualified for military duty" could not remain in the Active Reserve.

tions were on the ground that these Boards had no jurisdiction to consider plaintiff's claim (R. 3, 7f).[8]

Subsequently, the Secretary advised the plaintiff that the Army Board for the Correction of Military Records had jurisdiction to determine his eligibility for retirement pay (R. 7g).[9] Accordingly, plaintiff, in February 1952, filed an application with this Board (R. 7g), which was denied, without even affording plaintiff a hearing, in May 1954 (R. 3, 7g). Plaintiff filed suit in the Court of Claims in March 1955 (R. 1).

The Court of Claims held that plaintiff's cause of action accrued in 1947, when the Secretary approved the Army

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[8] In 1944, Congress enacted a second administrative remedy to implement the basic Act of April 3, 1939, a hearing by a Review Board. The statute provides in effect, for both a review of Retiring Board decisions and a *de novo* hearing in which evidence of facts which occurred subsequent to the original decision was admissible (Act of June 22, 1944, Servicemen's Readjustment Act of 1944, Sec. 302, 58 Stat. 284, 38 U. S. C. 693i; Appen. A, p. 2a; *Robertson* v. *Chambers*, 341 U. S. 27, 1951.

Although plaintiff had, in 1947, been assured a review, his application was now rejected on the basis of an administrative ruling that the Review Board had jurisdiction only when the officer's record showed he had been separated "for physical disability". In a similar case, the Court of Claims recently held such ruling to be erroneous (*Vaughn* v. *U. S.*, C. Cls. No. 355-54, decided July 12, 1956).

The rejection of plaintiff's application for a reconsideration by the Retiring Board was on the ground that the Board's action had become final and it had lost jurisdiction. This position was inconsistent with the Army's practice of reopening Retiring Board proceedings in cases where the officer had been awarded retirement pay on the basis of newly discovered medical evidence (*Carlin* v. *U. S.*, 121 C. Cls. 643, 100 F. Supp. 451, 1951; *Spencer* v. *U. S.*, 121 C. Cls. 558, 100 F. Supp. 444, 1951.

[9] In October 1951, Sec. 207 of the Legislative Reorganization Act of 1946 was amended to provide an effective remedy through proceedings before an Army Board for the Correction of Military Records with jurisdiction, subject to approval by the Secretary, to correct errors and remove injustices. Act of October 25, 1951, 65 Stat. 655, 5 U. S. C. Sec. 191a. (Statute quoted in Appen. A, p. 3a). This was the *third* administrative remedy enacted by Congress implementing the Act of April 3, 1939.

Retiring Board's findings and was barred by the six-year statute of limitations (R. 15).

REASONS FOR GRANTING WRIT

Importance of Federal Question

The question in the instant case is involved in numerous claims for retirement pay for disabilities incurred by military officers in World War II, many of whom, like plaintiff, were severely wounded in combat. The magnitude of these claims is evident in a 1948 Congressional hearing and report showing that out of approximately 1,000,000 non-Regular and warrant officers in the Armed Services, about 100,000 were in hospitals, as the result of disabilities, at the time of their separation. (Report of Investigation of Physical Disability Retirement of Officers of the Army, Navy and Marine Corps, Legal Subcommittee, Committee on Armed Services, House of Representatives, 1948, p. 6042.) [10] Many of these officers filed claims for retirement pay with the Armed Services and have been pursuing the administrative remedies provided by Congress.[11]

Under the decisions of the Court of Claims in the instant case and others, these officers will be deprived of the opportunity to have their claims considered by an independent judicial tribunal merely because they did not resort to that tribunal before their *quasi*-judicial remedies within the Armed Services were exhausted.

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[10] During the vast demobilization of 1944-1946, there were in the Army alone 99 Retiring Boards before whom appeared 85,000 officers (Testimony, Maj. Gen. Dahlquist, Hearings before the Legal Subcommittee of the Committee on Armed Services, 80th Congress, 2nd Session, pursuant to H. Res. 141 and H. Res. 447, Investigation of Disability Retirement Systems in the Armed Services.)

[11] The three remedies of 1941, 1944, and 1951 are referred to in Footnotes 6, 8, and 9, *supra*, and are described in detail on pp. 11-12 and footnote 15, *infra*.

It is extremely doubtful that any of these officers knew that they could litigate a claim against the "Army" in any court of law. The Army never so advised them and, if they had such knowledge, they naturally would not have resorted to the court until they had proceeded before the *quasi*-judicial boards within the Army established under the law for this purpose and to which the Army itself referred them.

The question is important not only because of the magnitude of the claims affected, but because the decisions of the Court of Claims make it impossible for many officers to obtain retirement pay concededly due them and of which they have been deprived by admitted mistakes and proven discrimination, injustice, and arbitrariness on the part of the Armed Services.[12]

It is a matter of public knowledge that for many years the Reserve and non-Regular officers of the Armed Services have struggled to obtain equal benefits with the Regulars. One of the fields of battle in this historic conflict has been disability retirement pay which the non-Regulars obtained from Congress in 1939 only after long and strenuous resistance on the part of the Regulars. (Report of House Legal Subcommittee, *supra*, p. 6023; Hearings, supra, p. 143). After the 1939 Act was passed, the Armed Services succeeded in circumventing it in various ways and

[12] These mistakes and injustices were demonstrated in the 1948 Congressional Hearings, *supra*, p. 9. They are described in detail, in Appendix B, p. 4a and footnotes 13 and 14, p. 11. An illustration of a concededly meritorious claim barred by the statute of limitations is *Girault* v. *U. S.*, C. Cls. No. 50474, decided on Motion for Rehearing Nov. 8, 1955, in which the Court goes to unusual lengths in describing the injustice and arbitrariness of the administrative decision and the great merit of the claim, but concludes that the statute of limitations was not tolled by the review proceedings and that the doctrine of continuing obligation did not apply. Judge Madden, dissenting in a later case, refers to the Girault and similar decisions as "evil" and as having done "harm" which should be undone by over-ruling them (*Gordon* v. *U. S.*, C. Cls. No. 106-55, decided April 3, 1956, quoted p. 19, *infra*).

the non-Regulars appealed to Congress for administrative remedies to enable them to realize the benefits Congress intended them to have.

The first remedy was enacted in 1941 when the non-Regular officers were assured Retiring Board hearings (App. A, p. 1a, Footnote 6, *supra*). This legislation did not afford the non-Regulars the protection intended[13] and they again appealed to Congress which, in the 1944 "G. I. Bill of Rights", enacted an additional administrative remedy, the "Review Board" hearing (See Footnote 8, *supra*).

This remedy did not rectify the situation and, in 1948, the non-Regular officers demanded and received a thorough investigation by a Committee of the House of Representatives. In this investigation, an abundance of proof was offered demonstrating that these officers had been deprived of retirement pay, not only by reason of admitted mistakes, but arbitrary and discriminatory conduct. The investigating Committee so reported to the Congress.[14]

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[13] From August 31, 1940 through November 30, 1942, of over 4,000 Reserve and National Guard officers who came before Army Retiring Boards, only 65 were granted retirement, an astonishing figure in view of the fact that an officer could not appear before a Retiring Board until he was found disabled after a thorough screening at an Army hospital and after appearance before a Disposition Board of three medical officers. (Testimony of Col. C. M. Boyer, Assistant to Executive Director, Reserve Officers Association, Hearings, *supra*, p. 171.)

[14] The Hearings and Report of the Subcommittee have been adverted to on p. 9 and footnote 10, *supra*. The mistakes arose out of the magnitude of the demobilization. In the Army alone 600,000 out of a total of 800,000 officers, plus the bulk of 8,000,000 enlisted men, had to be demobilized in 1½ years (Hearings, *supra*, pp. 5-12). The Retiring Boards, the Army Medical witnesses and the Disposition Boards were inexperienced (*Ibid.*). There were no physical standards for retirement, creating additional confusion and inequalities (Hearings, pp. 58, 165, 253). Everyone, patients and doctors, were in a rush to get home. The Army admitted that it made many mistakes and that many were not retired who should have been (Report, *supra*, p. 6032).

Moreover, it was frequently impossible to determine at the time

In 1951 Congress enacted new legislation providing for an additional remedy through the Board for the Correction of Military Records (App. A, p. 3a).[15]

All three remedies have proven inadequate, perhaps for the reason that neither the Retiring Board, Review Board nor Correction Board are independent tribunals. They all consist of employees of the Armed Services and as such cannot be considered entirely independent in their judg-

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of separation whether the disability was permanent or would improve. Only time could provide the answer. (Report, p. 6042).

In addition to the difficulties implicit in the magnitude of the workload and in the nature of the facts to be determined, a far more serious factor causing denial of retirement pay was the arbitrariness, unfairness and injustice of the Armed Services in administering the retirement statutes. The Hearings are full of proof of all kinds of injustices and discrimination against non-Regular officers. The investigating committee, in its report, makes findings thereof and expressly condemns certain practices. Examples of this reprehensible conduct are contained in App. B, p. 4a).

[15] The remedies of 1944 and 1951 were established not only to provide new hearings because of the injustices theretofore suffered by the officers in hearings which they had had. Their purpose, also, was to provide a hearing where, according to rulings of the Comptroller General and Judge Advocate General, they were prohibited. Under these rulings, actions taken by the Secretary upon findings of the Retiring Boards were final and could not be reopened or reconsidered even in cases where it was obvious that mistakes were made or it was impossible to determine the extent or permanence of the disability at the time of the hearing. This was one reason why the 1944 statute provided for *de novo* hearings by the Review Board. In addition, the Comptroller General had ruled that after the enactment of the Career Compensation Act in 1949, *63 Stat. 802, 37 U. S. C., Sec. 272*, officers who had been separated from the Army without processing for retirement, were not entitled to a Retiring Board hearing even though it was indisputable that they were permanently incapacitated at the time of separation. (*Updike* v. *U. S.*, 132 F. Supp. 957, C. Cls. 1955). Rulings of the Comptroller General also deprived many officers from obtaining a Review Board hearing. (*Vaughn* v. *U. S.*, C. Cls. No. 355-54, decided July 12, 1956). One of the purposes of the 1951 statute was to provide a remedy in cases in which, by reason of the above rulings, the officer had been held not entitled to a hearing, a condition precedent to retirement.

ment or immune from influence. In the statute establishing the Correction Board, a step forward was made by precluding military officers from serving on this Board as they did on the Retiring and Review Boards and by providing that only civilians could act as members thereof. But the civilians were still employees of the Armed Services. (See criticisms of Army Correction Board in Disabled American Veterans' "Semi-Monthly," Sept. 9, 1952, Sept. 29, 1953, May 31, 1954, Sept. 27, 1955; D. A. V. Annual Service Report on Military and Naval Affairs, Aug. 19, 1956).

Congress provided liberal periods of time for the exercise of the administrative remedies. The 1944 statute, which established the Review Board proceeding, permitted its exercise within 15 years from the action taken pursuant to the original Retiring Board decision. The 1951 statute, which made effective the Correction Board proceeding, permitted claims to be filed within 10 years from the date of the statute or 3 years of their discovery by the claimant, whichever was later, with authority given to the Board to waive this limitation in the interest of justice. A determined attempt to include a strict statute of limitations in the bill was rejected by Congress. (Hearings of Subcommittee of House Committee on Armed Services, on H. R. 1181, 82nd Congress, pp. 366, 272-73).

The Court of Claims has, in effect, held that Congress intended that the utilization of this liberal time to pursue his administrative remedies should bar the disabled officer from resort to the only independent tribunal available to him. To ascribe such an intent to Congress, which would virtually vest in the Army an absolute discretion in all claims for compensation for disability suffered in the last war, hardly seems possible in view of the fact that Congress was informed of the many injustices endured by the non-Regulars in the Army's administration of these claims.

The legislative history of the Act of 1951 negates such an intent for Congress expressly rejected a determined effort to bar the Federal courts from reviewing the decisions of the Correction Board. Both the Subcommittee of the House Armed Services Committee and the full Committee stated, in their reports, that the Federal courts should have the right to review. (House Report No. 449, 82nd Congress, May 10, 1951, pg. 3; Hearings on H. R. 1181, 82nd Congress, Committee on Armed Services, p. 450; Hearings of Subcommittee, pp. 377, 392).

If Congress intended the statute of limitations to bar the claims, the action of Congress in preserving the right of review by the Federal court would have been meaningless because six years had already elapsed from the 1944-1946 period when the Retiring Boards had made practically all of their initial decisions.

The determination, by this Court, of the questions involved herein is important, not only because it will affect the existing claims of thousands of disabled officers, but also because it will determine the procedure to be followed in the future. Under the present decisions of the Court of Claims, disabled officers will by-pass the administrative remedies within the Armed Services, excepting the initial one of the Retiring Board, and go directly to the Court of Claims. It will make the 1944 and 1951 statutes superfluous and impose an unduly heavy burden on the Court of Claims to determine technical, medical questions which should first be determined in the review proceedings which Congress has provided.

The Ultimate Issue in the Case Has Never Been Decided By This Court and the Decisions of the Court of Claims Are Inconsistent and Conflicting With a Sharp Division Among the Members of That Court

This Court has never decided the ultimate question in this case,—when does the statute of limitations bar claims for disability retirement pay.

In *Odell* v. *U. S.*, 135 F. Supp. 539, C. Cls., decided Nov. 8, 1955, the court (speaking through Madden, J.) states that under the prevailing Supreme Court decisions, the administrative remedies must be exhausted before resort to the Court, but that:

> "Our attention has not been called to any case in which the Supreme Court was required to determine whether a Statute of Limitation was tolled during the time consumed in the exhaustion of administrative remedies."

The decisions of the Court of Claims are so inconsistent and conflicting that it is impossible for counsel to determine whether or not a given claim has been barred. To compound the confusion, there is a sharp conflict among the five members of the Court on various aspects of the question.

The uncertainty of the Court of Claims as to the law was admitted by the Court itself as late as April, 1956. In *Thompson* v. *U. S.*, 139 F. Supp. 935, C. Cls., decided April 3, 1956, the Army Retiring Board had decided the claim in 1944, the Review Board in 1951. The legal question was thus the same as in the instant case and in a number of cases previously decided,[16] whether the six year period began upon the Retiring Board (1944) or Review Board (1951) decisions. The Government raised the question of statute of limitations for the first time after all the evidence had been admitted and the proof closed. Expressly referring to the question of limitations, the Court said (Whitaker, J.):

> "Since in this sort of case this is a judicial question we should have considered this at the outset, *but since it raises controversial legal questions about which*

[16] *Duff* v. *U. S.*, 135 F. Supp. 527, C. Cls., decided Nov. 17, 1955; *Odell* v. *U. S.*, 135 F. Supp. 539, C. Cls. Nov. 8, 1955, on rehearing 139 F. Supp. 749, April 3, 1956; *Girault* v. *U. S.*, 135 F. Supp. 521, C. Cls., Nov. 8, 1955.

there is some uncertainty . . . we have not discussed this issue." (Emphasis ours).

The decisions of the Court of Claims have been inconsistent with each other and in conflict with at least one decision of the Federal District Court. The inconsistency has occurred in each of the three basic questions involved in the statute of limitations:

1. When does the cause of action accrue?

2. Must the administrative remedies be exhausted?

3. Is the obligation to pay disability retirement pay a continuing one, that is, does a new cause of action for such pay accrue each month?

Accrual of Cause of Action. In *Uhley* v. *U. S.*, 128 C. Cls. 608, 121 F. Supp. 674, June 8, 1954, and *Capps.* v. *U. S.*, 137 F. Supp. 721, C. Cls., Jan. 3, 1956, the Court held that the cause of action does not accrue automatically upon separation but only when one of the Boards determines the underlying facts of incapacity and line of duty and the finding is approved by the Secretary. However, in *MacFarlane* v. *U. S.*, 140 F. Supp. 420, C. Cls., April 3, 1956 and *Seabrook* v. *U. S.*, 140 F. Supp. 787, C. Cls, May 1, 1956, it is indicated that the cause of action accrues on separation without any Board hearing.

There is a conflict among the members of the Court as to whether, in cases where the officer is not permanently incapacitated at the time of separation, but becomes so at a later time as a result of disease or injury incurred in the service, a cause of action accrues at the time the officer becomes disabled. The majority of the Court holds that the disabled officer has no cause of action whatsoever unless he is permanently incapacitated at the time of separation. Two of the Judges believe that the officer should not be denied retirement pay merely because the injury or disease has not actually become incapacitating at the time

of separation and that the cause of action accrues at the time he becomes disabled. (*MacFarlane* v. *U. S.*, 140 F. Supp 420, C. Cls., April 3, 1956; *Palluconi* v. *U. S.*, C. Cls. No. 420-54, decided June 6, 1956).

Exhaustion of Administrative Remedy. In a number of cases the Court has stated, as in the instant case, that after a Retiring Board decision, the pursuit of the remedy before the Review Board and/or the Correction Board and arbitrary decisions by these latter Boards, neither toll the statute of limitations nor create new causes of action. (*Soukaras* v. *U. S.*, 140 F. Supp. 797, C. Cls., May 1, 1956; *Odell* v. *U. S., supra; Duff* v. *U. S., supra; Girault* v. *U. S., supra.*)

However, the court has indicated that if the decision of the Correction Board is arbitrary, either the statute of limitation would be tolled or a new cause of action would accrue at the time of the decision. (*Rosnick* v. *U. S.*, 132 C. Cls. 1, 132 F. Supp. 478, 4/5/55 and 7/12/55.) And the court has held that a decision of the Review Board created a new cause of action, refusing to bar the claim on the ground that the Retiring Board decision had been made before the six-year period (*Capps* v. *U. S., supra.*)

In *Odell* v. *U. S., supra,* the court (Madden, J.) indicated it was necessary to exhaust the administrative remedy before prosecuting a claim in the Court of Claims but that such procedure did not toll the statute of limitations. In *Cuiffo* v. *U. S.*, 131 C. Cls. 60, March 1, 1955, however, the court stated through Whitaker, J., that if it were necessary to exhaust the administrative remedy, the statute of limitations would be tolled. Finally, contrary to *Odell, supra,* the Court said in *Duff, Girault* and *MacFarlane, supra,* that it was not necessary to exhaust any administrative remedies after the first Board hearing. These decisions are squarely in conflict with the decision of the United States District Court for the District of Columbia in *Randolph* v. *U. S.*, 69 F. Supp. 156, 1946, holding (prior

to the time the Correction Board remedy became effective, but after the establishment of the Retiring and Review Board remedies) that it was necessary to exhaust not only the initial remedy with the Retiring Board but the remedy with the Review Board before resorting to the Federal court.

Continuing Obligation. In the instant case, as well as in others, the court has held that retirement pay is not a continuing obligation with a new cause of action accruing monthly. (*Odell* v. *U. S., supra; Girault* v. *U. S., supra; MacFarlane* v. *U. S., supra; Field* v. *U. S.*, C. Cls. No. 525-53, 1956.) These holdings are squarely in conflict with its decision in *Seabrook* v. *U. S., supra,* and a long series of decisions in analagous cases over a period of eighty years. Some of these cases are cited in Judge Madden's dissent in *Odell* v. *U. S., supra,* decided on rehearing, April 3, 1956. They include *Ellsworth* v. *U. S.*, 14 C. Cls. 382, affirmed 101 U. S. 170 (yearly installments of compensation as Collector of Customs); *Watson* v. *U. S.*, 21 C. Cls. 511, affirmed 130 U. S. 80; *Moore* v. *U. S.*, 76 C. Cls. 753, etc., etc. In his opinion Judge Madden stated:

> "The plaintiff, having been disabled in military service, became entitled to an annuity, payable in periodic installments, for the rest of his life. By his delay in bringing suit, he lost as many of those installments as became due and payable more than six years before he filed his suit. The court holds that he has also lost all of the other installments for the rest of his life, although they were not due and payable more than six years before he filed his suit. This conclusion is obviously unjust and is, I think, erroneous. (Citations)
>
> In all these, and many other cases, this court has held that those installments of the claim which became due and payable more than six years before suit was filed were barred, but that other installments not so due were collectible. In recent years we have, in a few cases, departed from this orthodox and correct rule. The results, in some cases shockingly unjust,

should have put us on our guard, but did not. In Hunter Louis Girault v. United States, No. 50474, decided November 8, 1955, we found that the action of the Secretary of War was 'clearly contrary to the law', yet we allowed his illegal action to deprive a soldier of his legal rights for the rest of his life. Such an unworthy end is not a reason for inventing a novel and unorthodox legal doctrine.

I am unable to understand the court's reasoning in the instant case. In part it seems to say that an officer is entitled to retired pay only if the Secretary of War awards it to him. But in all of our cases involving retired pay, the Secretary has not awarded the retired pay sought. If he had done so, the case would not be here. The cases come here because, it is asserted, the Secretary has illegally denied retired pay which the statutes and the regulations have awarded. I see not the slightest difference between the legal right of a soldier to his retired pay and the legal right of a civilian employee of the Government to his statutory salary. In either case, if he does not get it, it is because some superior in the Government misapplied the law, or acted without evidence, or arbitrarily. If a landlord, or the owner of an annuity policy, or a civilian employee of the Government, delays in bringing suit, he loses those installments of his claim which are too old, but he does not lose all. I can imagine no reason why soldiers should be selected as the sacrificial offerings to nourish a novel legal doctrine."

In *Gordon* v. *U. S.*, 140 F. Supp. 263, C. Cls., April 13, 1956, the Court of Claims held, inconsistently with the foregoing decisions, that longevity retirement pay is a continuing obligation. The majority sought to distinguish its conflicting decisions on the ground that where there are no controversial factual questions involved, but merely a legal question, retirement pay *is* a continuing obligation. In his concurring opinion, Judge Madden, after adverting to this "novel" doctrine, stated:

"When a court originates a new doctrine, it does so because there is an evil to be cured. The evil which

has given rise to this doctrine is not difficult to identify. The court has adopted another novel doctrine, *viz.*, that an officer entitled to retirement with an annuity for life is deprived of that annuity for all the rest of his life if he neglects to file his suit for it within six years of the time of his release from active duty. Having applied this doctrine in a number of cases, we, quite naturally have not been pleased with the results. See, *e.g.*, Hunter Louis Girault v. United States, No. 50474, decided November 8, 1955; Courtney J. Odell v. United States, No. 145-55, this day decided.

The treatment of the statute of limitations in the instant case is an effort to undo a part of the harm done by our recent decisions. I would undo all of that harm by overruling those decisions. Instead of inventing a new doctrine to partly neutralize the harmful effects of another newly invented doctrine, I would discard both and again acquire the freedom to decide all the cases of this type as they could and should have been decided according to the law as it has been for decades."

Thus the Court of Claims is sharply split on various phases of the statute of limitations and particularly on the question of continuing obligation. Only this Court can resolve the conflicts, uncertainty and doubt resulting from these decisions.

The Decisions of the Court of Claims Upon the Question of Continuing Obligation and Exhaustion of Administrative Remedies Are in Conflict With the Decisions of This Court

The decision in the instant case and others of the Court of Claims, holding that retirement pay is not a continuing obligation, is in conflict with the following decisions of this Court:

1. *U. S. v. Ellsworth*, 101 U. S. 170, which affirmed the Court of Claims decision in 14 C. Cls. 382 holding that plaintiff's claim for annual installments of compensation as a Collector of Customs was a continuing obligation, that each annual installment constituted a new cause of action

and only those which accrued prior to the six-year period were barred.

2. *U. S.* v. *Watson,* 130 U. S. 80, 1889, affirming the decision of the Court of Claims, 21 C. Cls. 511, that monthly longevity retirement pay is a continuing obligation and only that which accrued prior to the six-year period is barred.

3. *U. S.* v. *Moser,* 266 U. S. 236, 1924, affirming 58 C. Cls. 164, holding that plaintiff could recover longevity retirement pay for the period of six years prior to the filing of his suit, although the pay originally accrued in 1904, approximately 20 years before.

The decisions of the Court of Claims that the administrative remedies need not be exhausted is in conflict with *Gusick* v. *Shilder,* 340 U. S. 128, 131, 132 and *U. S.* v. *Sing Tuck,* 194 U. S. 161. In citing these two cases, Judge Madden in *Odell* v. *U. S., supra,* said:

> "The Supreme Court of the United States has repeatedly held that one must first exhaust his administrative remedies in order to maintain a suit in court. A recent case is Gusick v. Shilder . . . and in U. S. v. Sing Tuck . . . the court held that even though Congress has not made the exhaustion of administrative remedies a condition of the right to sue in court, if Congress has made available an administrative remedy, one must exhaust it before he can resort to the courts."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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